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**Supreme Court of the United States**

## OCTOBER TERM, 1954

No. 7

WILBURN BOAT COMPANY, *et al.*,                      *Petitioners,*

vs.

FIREMAN'S FUND INSURANCE COMPANY, *Respondent.*

**MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF  
IN SUPPORT OF PETITIONERS**

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### Applicants

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The undersigned members of this Bar request leave to file a brief in petitioner's support.

Petitioners consent. Respondent neither unequivocally gives nor refuses consent. (See Appendix.)

Our direct interest arises thus: We represent a seaman who sustained serious injuries aboard a vessel operated between Seattle and ports in Southeastern Alaska by a Delaware corporation. An action against that operator in the United States District Court for the District of Delaware resulted in judgment for the seaman for \$25,000.00. Suit on that judgment was brought in a local Superior Court against an insurance company which had written a policy of marine liability insurance issued in California. The California Insurance Code contains a provision which is substantially comparable to the provisions of the Texas Code.

The local trial court held that the California Code provisions became incorporated in the policy of insurance and controlled its interpretation but that trial

court also held that the Delaware judgment was not entitled to full faith and credit in Washington. The result was judgment for the marine insurer. On appeal the Supreme Court of Washington agreed as to the application of the California statute but gave full faith and credit to the Delaware judgment, resulting in a Washington judgment in favor of the seaman which, together with interest and taxable costs, now amounts to some \$32,000.00.

Our Supreme Court decision was filed on August 24, 1954, notice of it being received by us on the following day. Under the circumstances literal compliance with the Amended Rule 42 was impossible.

Our proposed brief will undertake to establish that:

1) Nothing in the Federal Constitution precludes Congress from regulating marine insurance.

2) Nothing precludes Congress from permitting the several states to regulate marine insurance in absence of exclusive regulation by Congress.

3) The McCarran Act of 1945, sustained as constitutional in *Prudential Insurance Company v. Benjamin*, 328 U.S. 408, expressly approves state regulation of all insurance, including marine.

4) To sustain the Fifth Circuit Court of Appeals will require that this court read into the McCarran Act of 1945 an excluding proviso reading, in substance, *that nothing in this Act shall authorize any state to regulate or tax marine insurance.*

The judgment in favor of our client is directly in peril. Petitioners' brief no doubt covers the question,

but, nevertheless, we believe that to a degree it may obscure the vital constitutional question by the discussion of details relative to the Texas statute. Moreover, several decisions not cited may have a controlling influence. We refer particularly to the decision of Chief Justice Hughes in *Detroit Trust Company, Trustee v. Steamer Thomas Barlum*, October Term 1934, 293 U.S. 21, 79 L. Edition 176, sustaining the Preferred Ship Mortgage Act of 1920, a radical departure from pre-existing maritime law. There are several other decisions which it would be improper to discuss at length now.

The Supreme Court of Washington in its decision filed August 24, 1954, rested its conclusion specifically on the opinion of Mr. Justice Black in *Maryland Casualty Company v. Cushing*, 347 U.S. 409, 98 L. Edition 519, and refused to accept the decision of the Fifth Circuit Court in this *Wiburn* case.

That decision, though filed on August 24, 1954, is not yet final, the time for a petition for rehearing not having expired and such a petition we are advised will be filed.

We appreciate that rules are made to be observed, but under the unusual circumstances of this case it is obvious that a literal compliance with the Amended Rule 42 was not possible.

If the Supreme Court of Washington had sustained the lower court in holding that the Delaware judgment, by reason of jurisdictional imperfections, was not entitled to full faith and credit then the validity or in-

validity of the California statute would have become a moot question in our case.

If this motion is granted our brief will be filed promptly and will not exceed twenty pages.

Respectfully submitted,

STEPHEN V. CAREY  
SAMUEL B. BASSETT  
JOHN GEISNESS  
*Applicants*

### CERTIFICATE

I DO HEREBY CERTIFY that the foregoing motion was served on petitioner's attorney, Theodore G. Schermeyer, at his office, San Jacinto Building, Houston 2, Texas, by mail and I do further certify that said motion was served by mail on Edward B. Hayes, respondent's attorney, at his office, 123 South La Salle Street, Chicago 3, Illinois. In each instance said service was made by depositing a copy of said motion in the United States Post Office at Seattle, Washington, on the 21st day of September, 1954, with airmail postage prepaid.

STEPHEN V. CAREY

### APPENDIX

Seattle, Washington, September 14, 1954

EDWARD B. HAYES  
Attorney at Law  
The Field Building  
123 South LaSalle  
Chicago 3, Illinois

Re Wilburn Boat vs Fireman's Fund U. S. Supreme Court we wish file Amicus Curiae brief having direct interest resulting from decision Supreme Court, Washington, Williams vs. Steamship Mutual copy to you air

mail. Please wire your consent if consistent with interests your client otherwise please wire refusal so that we may make formal application in compliance with rule. Prompt response greatly appreciated.

BASSETT, GEISNESS & VANCE

Chicago, Illinois, Sept. 15, 1954

BASSETT, GEISNESS & VANCE  
New World Life Building  
Seattle, Washington

Reurtel of yesterday afternoon. Please refer to Rule 42 U. S. Supreme Court effective July 1st last. Petitioner's brief on the merits was filed August 25th last when the time therefor expired. Apparently the court will not receive a new brief on that side now from a stranger to the cause. The case is set for argument in a few weeks which may illustrate the occasion for the rule forbidding an Amicus Curiae brief after time has expired for the brief of the party sought to be supported thereby. In any event since my consent would be ineffective under the Supreme Court's rule I should appreciate it if you would withdraw your request for it.

EDWARD B. HAYES

Seattle, Washington, September 15, 1954

EDWARD B. HAYES  
Attorney at Law  
123 South LaSalle  
Chicago, Illinois

Familiar with rule. We interpret your telegram fifteenth as refusing our request of fourteenth. If incorrect please advise.

BASSETT, GEISNESS & VANCE